Articles

Beyond *Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law

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I. The Dual Origins of "Influence Districts"

THE QUESTIONS OF how or whether courts should shape electoral structures in order to maximize the "influence" of members of minority groups are not new. In his dissent in *Allen v. Board of Elections*,[1] the first case in which the United States Supreme Court interpreted the Voting Rights Act to apply to electoral structures, Justice John Marshall Harlan declared that "it is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers."[2] Whatever the situation in 1969, after the 1982 amendments to section 2 of the Voting Rights Act, there is no doubt that Congress has decided that the standard should be that minority voters should have a fair opportunity to *elect* candidates of their choice—that is, to determine the choice regardless of the desires of majorities of majority group voters—and that district systems protect that right better than at-large systems.[3] That does not, however, entirely ex-

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1. 393 U.S. 544 (1969).

2. *Id.* at 586. *See* League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 649-50 (5th Cir. 1990) (Higginbotham, J., concurring); United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978); Kirksey v. Board of Supervisors, 554 F.2d 139, 161 (5th Cir. 1977) (Hill, J., dissenting); Southern Christian Leadership Conference v. Evans, 785 F. Supp. 1469, 1478-79, 1486-87 (M.D. Ala. 1992).

3. Solomon v. Liberty County, 865 F.2d 1566, 1583 (11th Cir. 1988); Emison v. Growe, 782 F. Supp. 427, 440 (D. Minn. 1992); Jeffers v. Clinton, 730 F. Supp. 196, 265 (E.D. Ark. 1989); Potter v. Washington County, 653 F. Supp. 121, 129 (N.D. Fla. 1986).

haust the force of Harlan's criticism. What about the case in which members of a group cannot form a "political majority"?[4] Should courts intervene to pool geographically compact minority group members into one or a few districts, or to stop redistricters from fragmenting them? Or should courts decide, in effect, that the groups are too small to have any cognizable rights, such that they will have to make their own way through the political thicket? In the extreme, does a group that makes up 49.9% of a "political majority" deserve no special protection as a "discrete and insular minority"[5] under the Voting Rights Act or the United States Constitution, while a group that comprises 50.1% does? This would certainly be a concept of "group rights" with a vengeance, protecting larger groups, which presumably have a greater ability to take care of themselves through normal politics, more than it protects smaller groups, which are more at the mercy of majorities.[6]

There is also another, more practical, political origin to the influence district problem. For many years, those who drew reapportionment plans have been compressing minority communities into a small number of districts ("packing") or spreading them thinly into a large number of districts ("stacking") depending on the demography of the area and the objectives of the planners. In the post-*Reynolds v. Sims*[7] reapportionment in California in 1965, for example, the heavily Latino area of East Los Angeles was cut into nine state assembly and six congressional districts. Had the boundaries been drawn differently, Latinos would probably have been able to determine the elections of some officials. Once the "control" seats were drawn, if the remaining parts of the area had been combined, Latinos would have been able to influence the election of other

4. This problematic term is left undefined for the time being. Problems with this concept are discussed in part III, *infra*. Courts have recognized the concept, but left it undefined. *See* Ketchum v. Byrne, 740 F.2d 1398, 1401-03, 1410 & n.13 (7th Cir. 1984) (discussing "effective majority").

5. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

6. The plurality opinion in City of Mobile v. Bolden, 446 U.S. 55, 78-79 (1980), asserts that the Court's decisions have squarely rejected a right to group representation. During Senate hearings on the renewal of the Voting Rights Act in 1982, many conservative witnesses decried the recognition of "group voting rights." *See Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1351-54 (1982) (statement of James F. Blumstein, Professor, Vanderbilt University Law School); *id.* at 509-10 (statement of Dr. Edward J. Erler, National Humanities Center); *id.* at 231 (statement of Walter Berns, Professor, American Enterprise Institute). Opponents of giving minorities the right to elect candidates of their choice, such as Judge G. Thomas Eisele, still harshly decry the concept of "group rights." *See* Jeffers v. Clinton, 730 F. Supp. 196, 229 (E.D. Ark. 1989) (Eisele, J., concurring and dissenting), and Jeffers v. Clinton, 740 F. Supp. 585, 626 (E.D. Ark. 1990) (Eisele, J., dissenting).

7. 377 U.S. 533 (1964).

officials very markedly, though perhaps not decisively. Before recent trends in voting rights law, white politicians often split up concentrations of minority groups and advised them to be satisfied with diffuse influence. Now, some courts are telling them to be satisfied with whatever highly concentrated districts, if any, can be drawn, because the law does not protect against the fragmentation of minority-minority groups (i.e., minority groups that do not form a majority of the population in an area).[8] Is this not a continuation of a slightly diminished discrimination in another guise?

Any proposal for a legal stance on the question of influence districts should continue the dominant line of tradition of Congress and the courts, rather than contravene it. Therefore, Part II of this Article traces the "practical" or "pragmatic" tradition in voting rights law from the passage of the Reconstruction Constitutional Amendments[9] through the 1982 amendments to the Voting Rights Act and the nearly simultaneously issued United States Supreme Court decision in *Rogers v. Lodge*.[10] Beginning in 1870, Congress, and later the courts, rejected an abstract, formulaic, "bright line" approach to voting rights law except during the period of massive discrimination and disfranchisement. Both Congress and the Supreme Court went beyond protecting the bare right of members of minority groups to vote. Instead, they realized that to cast an effective vote, African-Americans and others had to be sheltered from violence, intimidation, and fraud, and they had to be free to speak and organize. In the 1940s, courts insisted on nondiscrimination in primaries, and in the late 1960s, they helped guarantee the right to be free of recently established discriminatory electoral structures.

The courts and Congress refused to accept two proffered bright lines: one drawn, in effect, between voting per se and everything else, and the other guaranteeing proportional representation. Rather, they adopted the less precise, but more nuanced "totality of the circumstances" test for proving both intent and effect.

Part III of this Article discusses the three-pronged test outlined in *Thornburg v. Gingles*.[11] Even though *Gingles* is sometimes interpreted to imply that courts do not need to pay attention to minority groups who cannot form effective majorities of electoral districts, Justice Brennan's opinion in *Gingles* specifically refuses to foreclose that question. Both the logic of the opinion and contemporary political experience contra-

8. McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988).
9. U.S. CONST. amends. XIII, XIV, and XV.
10. 458 U.S. 613 (1982).
11. 478 U.S. 30 (1986).

vene the alleged implication. More specifically, it is wrong for courts to isolate the first prong of the *Gingles* test from the other two. Viewed as interconnected, the three parts of the test do not preclude a consideration of the question of influence districts. Indeed, election data from both hypothetical and actual examples demonstrates that there is no possible theoretical division between influence districts and control districts. Part III concludes that *there is no bright line in Gingles.*

Part IV looks briefly at some federal court opinions concerning influence districts, concentrating on *Garza v. County of Los Angeles,*[12] *Armour v. Ohio,*[13] and *McNeil v. Springfield Park District.*[14] The diverse analyses and criticisms of these cases suggest two different, but more systematic approaches to the influence district problem—a "results" approach and an "intent" approach—which are discussed in Part V. The analysis of both approaches concentrates on the totality of the circumstances standard, in line with the pragmatic tradition, the intent of Congress in extending and amending the Voting Rights Act in 1982, and the Supreme Court's decisions in *White v. Regester*[15] and *Rogers v. Lodge.*[16] Finally, Part V attempts to respond generally to criticisms of protecting the interests of small minority groups. It concludes that both the value of bright line standards and the dangers of relaxing them have been exaggerated.

II. The Pragmatic Tradition in Voting Rights Law

A. The Reconstruction Enforcement Acts

The dominant tradition in voting rights law in American history has been practical and flexible, not formalistic and formulaic. It has been a tradition of equity, not of law.[17]

In their most cramped construction, the Fourteenth and Fifteenth Amendments might be held to protect nothing more than the bare right to cast a ballot. The first section of the Fourteenth Amendment does not refer to voting at all, while that of the Fifteenth Amendment only states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race,

12. 756 F. Supp. 1298 (C.D. Cal. 1990).
13. 775 F. Supp. 1044 (N.D. Ohio 1991).
14. 851 F.2d 937 (7th Cir. 1988).
15. 403 U.S. 124 (1971).
16. 458 U.S. 613 (1982).
17. On the equity tradition in American law, *see* PETER C. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA (1990).

color, or previous condition of servitude."[18] The Radical Republican Congresses that passed these Amendments, however, were well aware that an effective ballot required much more than just the abstract right to attend the polls and cast it. Violence or fraud could prevent people from voting or nullify the result. Denial of the right to speak or organize could undermine political activity and render voting meaningless. Without protection of such rights, the ballot would become merely an empty abstraction, not a practical means for former slaves and white Unionists to protect themselves.

Accordingly, Congress passed a series of three Enforcement Acts in 1870 and 1871, the first coming within three months of the ratification of the Fifteenth Amendment.[19] The Act of May 31, 1870,[20] not only made it a misdemeanor for election officials and others to deny blacks the right to vote, but also attempted to combat the Ku Klux Klan and similar groups by declaring that violence or conspiracy to deny anyone the right to vote was a felony punishable by a fine of up to $5000 and a maximum of ten years in prison. Recognizing that widespread terrorism would tax the existing skeletal federal enforcement machinery, the forty-first Congress increased the number of court commissioners and authorized, if necessary, the use of federal troops to protect voting. Fraud was made illegal, and candidates who lost because of racially discriminatory actions could seek injunctive relief in federal courts.

The Supervisory Act of February 28, 1871,[21] provided for close federal regulation of registration and ballot counting to strengthen the protections against fraud and the denial of the vote throughout all stages of the electoral process. If two citizens of any city whose population exceeded 20,000 requested an election supervisor, the judge of the federal court containing that city had to appoint such a supervisor. The supervisor, with special deputy marshals at his disposal, was authorized to scrutinize every aspect of voting, from registration, through possible intimidation, to counting the votes. Thus, instead of issuing a detailed list of invalid practices, thereby inviting Klansmen and political manipulators to invent new methods of nullifying the rights of citizens, Congress authorized the appointment of a quasi-judicial administrator with the power and authority to deal with techniques of discrimination and chicanery that Congress might not have thought of or included in its inven-

18. U.S. CONST. amend. XV, § 1.

19. *See* THE RADICAL REPUBLICANS AND RECONSTRUCTION, 1861-1870, at 509-15 (Harold M. Hyman ed., 1967).

20. Ch. 114, 16 Stat. 140 (1870).

21. Ch. 99, 16 Stat. 433 (1871).

tory. During the next two decades, the testimony of federal election supervisors was often crucial in unseating fraudulently elected Southern members of Congress.

Less than two months later, the forty-second Congress attempted to protect the right of free speech by declaring it a crime to use force or threats to prevent voters from "giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy. . . ."[22] To the Reconstruction Congresses, the still-powerful injunction against intruding on the rights of the states had to give way to the attempt to *practically* protect the right of individuals and groups to vote.

B. From the White Primary to the Voting Rights Act

For many years, from *United States v. Reese*[23] and *United States v. Cruikshank*[24] through *Giles v. Harris*[25] and beyond, the Supreme Court abandoned its practical tradition—and blacks were disfranchised and then denied legal recourse.[26] The white primary case, *Smith v. Allwright*,[27] marked a return to the original practical spirit of the Reconstruction Congresses.[28] In *Smith*, the Supreme Court brushed aside the contention that the Democratic Party was a private group that could set its own membership criteria, and therefore, the restriction of its primary to whites did not represent "state action."[29] As everyone realized, but as previous Supreme Court decisions had disingenuously refused to recognize,[30] in Texas at such time, the Democratic primary was not merely an integral part of the electoral process, it was the only election that mattered. Attempts to evade *Smith* by repealing state election laws in South

22. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).
23. 92 U.S. 214 (1875).
24. 92 U.S. 542 (1875).
25. 189 U.S. 475 (1903).
26. *See* J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 160-62 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *The Two Reconstructions*]; J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591, 688-89 (1991).
27. 321 U.S. 649 (1944).
28. For an excellent historical treatment of *Smith*, *see* DARLENE C. HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS (1979).
29. 321 U.S. at 664-65.
30. *E.g.*, Grovey v. Townsend, 295 U.S. 45 (1935).

Carolina[31] and requiring a pledge of allegiance to white supremacy in Alabama[32] were struck down by lower federal courts.

The Supreme Court strode deeper into the political thicket in *Gomillion v. Lightfoot*.[33] To counteract rising black voter registration in the county that had the highest proportion of African-Americans in the country, the Alabama state legislature cut the town of Tuskegee into an "uncouth 28-sided figure" that excluded all but four or five blacks from the town limits. Despite Justice Felix Frankfurter's reluctance to involve the Court in political matters, a reluctance that delayed the reapportionment decisions for nearly a generation,[34] he was so outraged by the Tuskegee gerrymander that he discarded his abstract principles and faced the practical problem of vote dilution. Black votes, Frankfurter and the other justices realized, were useless if discriminatory redistricting denied them influence in elections.

The Voting Rights Act of 1965 was both the strongest protection of the right to vote ever enacted into federal law and the strongest illustration of the pragmatic tradition in voting rights law. It did not merely suspend the literacy test and authorize the appointment of federal voting registrars, the provisions that attracted the most attention at first. Like the forty-first and forty-second Congresses, the eighty-ninth Congress realized that Southern states would invent ingenious schemes to circumvent the intent of the law, and in both Reconstructions, new, quasi-judicial administrative officers were created to prevent those evasions. Section 5 of the Voting Rights Act required all state and local legal changes related to elections in "covered jurisdictions" to be submitted for preclearance to the United States Department of Justice in Washington. But what was a "covered jurisdiction"? Recognizing that it lacked the staff to supervise the whole country, as well as the fact that the worst problems of disfranchisement were concentrated in a few Deep South states, Congress established a criterion combining the use of a literacy test and a level of voter turnout in a particular presidential election that had the vice of seeming jerry-built, but the virtue of targeting the Deep South.[35] Once again, the Congress discarded tidiness and abstractions in favor of practical results.

31. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

32. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949).

33. 364 U.S. 339 (1960).

34. *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946).

35. STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 312-13 (1976).

C. From Jackson, Mississippi, to Burke County, Georgia, with a Side Trip to Mobile, Alabama

Allen v. Board of Elections[36] affirmed the spirit of section 5 of the Voting Rights Act and closed off an avenue of evasion in covered jurisdictions. To mitigate the effect of an increase in the proportion of blacks registered to vote from 7% to nearly 60% in the years immediately following the passage of the Voting Rights Act, the state of Mississippi changed the mode of election of many local governing bodies from district to at-large and made other offices appointive, instead of elective. Contending that these laws had nothing to do with "voting," and that the Voting Rights Act was designed only to allow blacks to cast a ballot, not to regulate electoral systems, Mississippi denied that it was legally required to submit these legal changes to Washington.[37] Not only did the Supreme Court reject the state's argument, but it also stated the purpose and scope of the Voting Rights Act in the most far-reaching terms. The Act "was aimed at the subtle, as well as the obvious, state regulations which have the *effect* of denying citizens their right to vote because of their race."[38] Section 5 required preclearance of any state law "which altered the election law of a covered State in even a minor way."[39] A year later, Congress in effect affirmed the Court's interpretation of the Act when it fully extended section 5.[40] No one in the Nixon Administration or in Congress made any serious effort to question the *Allen* decision—in stark contrast with the actions of the civil rights community a decade later, after the *City of Mobile v. Bolden* case.[41]

It is ironic that the first full-blown at-large election case that the Supreme Court heard came not from a Southern state, but from a Northern state. In *Whitcomb v. Chavis*,[42] a case where multi-member state legislative districts in Indianapolis, Indiana, were challenged, the Court said it was not enough for plaintiffs to contend that an electoral system denied blacks proportional representation. Instead, they must show "that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect leg-

36. 393 U.S. 544 (1969).

37. On the Mississippi laws, *see* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990).

38. *Allen*, 393 U.S. at 565 (emphasis added).

39. *Id.* at 566.

40. *See* PARKER, *supra* note 37, at 180-82.

41. 446 U.S. 55 (1980). For a further discussion of *Allen* and the point made in the text, *see The Two Reconstructions*, *supra* note 26, at 171-73.

42. 403 U.S. 124 (1971).

islators of their choice."[43] This "participate and elect" standard, first enunciated in *Chavis*, went beyond Mississippi's contention in *Allen*, which would have guaranteed only a very limited right to participate, and stopped short of adopting a mechanical proportional representation rule, which would have provided a very bright line. Had either the Court in *Chavis*, or later the Congress, in considering renewal of the Voting Rights Act in 1981-82, adopted such a standard, the tasks of judges and lawyers would have been much easier: when confronted with an allegedly discriminatory electoral system, they would compare the proportion of minority electors with that of minority officeholders; if the first exceeds the second, the plaintiffs win; if not, the defendants win.[44] Anyone who abjures less specific criteria in voting rights cases as messy and vague must justify the rejection of the extremely simple, manifestly judicially manageable standard of proportional representation.

Rather than adopt the proportionality criterion, the Supreme Court chose to remain flexible, enunciating a "totality of the circumstances" test in its unanimous decision in the 1973 Texas case of *White v. Regester*.[45] The Court concluded that multi-member legislative districts in Dallas and Bexar County illegally discriminated against African-Americans and Latinos, while the Indiana districts did not. This difference was due to a series of different factors that were present and proven in Texas, but that had not been demonstrated in Indiana.[46] In Dallas, there was a notable and notorious history of discrimination. Candidates had to run for numbered places and win by a majority vote. Elections were practically controlled by a white slating group, and were often characterized by blatant racial appeals. In San Antonio, Latinos suffered from a history of discrimination and a markedly unresponsive government, and they faced language barriers. The precedent of *White* was codified in the appeals court case of *Zimmer v. McKeithen*.[47] The "*White-Zimmer* factors" concentrated on the effect of discrimination and dominated voting rights law for several years. Providing a general guidance scheme for organizing evidence, not an abstract, mechanical bright line test, the *White-Zimmer* factors were squarely in the main line of the voting rights tradition.

43. *Id.* at 149.

44. The number of seats on the governing body must also be taken into account. The extra minority proportion, rounded off, must be equal to the proportion that one member of the governing body represents.

45. 412 U.S. 755 (1973).

46. *Id.* at 765-70.

47. 485 F.2d 1297 (5th Cir. 1973).

The plurality opinion in the 1980 Supreme Court case of *City of Mobile v. Bolden*[48] gave non-bright line standards a bad name.[49] Selectively reinterpreting past court decisions, Justice Potter Stewart announced that the Voting Rights Act and the Fifteenth Amendment harbored a previously unnoticed intent requirement.[50] The requirement, moreover, could not be satisfied by proving the *White-Zimmer* factors,[51] and Stewart did not indicate what *would* satisfy him.[52] Over the strenuous dissent of Justice Byron White, who had written not only *White v. Regester*, but also the Court's initial decision on intent in the 1970s, *Washington v. Davis*,[53] Justice Stewart examined the evidence from Mobile piece by piece and proclaimed that no single part of the evidence had proven a discriminatory purpose.[54] Four justices disagreed.[55] The problem with *Bolden* was that it discarded the "totality of the circumstances" test and put nothing in its place. It was a soft wall or wavering line of demarcation.

The civil rights community and law school critics exploded. The *Bolden* decision was almost unanimously denounced, and the community took the occasion of the 1982 expiration of section 5 of the Voting Rights Act to lobby intensively and extensively for a congressional overturning of Justice Stewart's opinion and a return to the *White-Zimmer* factors. In a rebuke to the Reagan Administration, Congress overwhelmingly lined up with the critics, as the much strengthened Act passed the House, by a margin of 389-24, and the Senate, 85-8. The extensive hearings and committee reports reverberated with condemnations of *Bolden*, and the authoritative Senate Report No. 417 specifically endorsed and enumerated the "*Zimmer* factors."[56]

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48. 446 U.S. 55 (1980).

49. Of course, an intent requirement had been criticized before. See the trenchant and, for a time, prophetic, criticisms of Judge John Minor Wisdom in his concurrence in Nevett v. Sides, 571 F.2d 209, 231-34 (5th Cir. 1978).

50. *Bolden*, 446 U.S. at 62-65.

51. *Id.* at 72-74.

52. In Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), which was decided along with *Bolden*, Judge Gerald B. Tjoflat interpreted *Zimmer* as an intent case and treated its factors as providing circumstantial evidence of a discriminatory purpose. *Id.* at 215, 222. Justice Stewart could have simply followed Judge Tjoflat's lead, as Justice White did, in effect, in Rogers v. Lodge, 458 U.S. 613 (1982).

53. 426 U.S. 229 (1976).

54. *Bolden*, 446 U.S. at 73-74.

55. Justices White, Brennan, and Marshall dissented separately. *Id.* at 94-141. Justice Blackmun thought that a discriminatory purpose was proven, but thought that District Court Judge Virgil Pittman's remedy had gone too far. *Id.* at 80 (Blackmun, J., concurring in the result).

56. S. REP. No. 417, 97th Cong., 2d Sess. 28-29 (1982).

Before the revised Act passed, but after it had become clear what its final form would be, a new majority of the Supreme Court[57] in effect merged *Bolden's* requirement of proving purpose with the *Zimmer* standards.[58] In a six to three decision, with Justice White rather triumphantly writing the opinion of the Court, the Court ruled that the at-large system in Burke County, Georgia, had been maintained for a racially discriminatory purpose, and that that purpose was indicated by almost the same list of factors that the Senate Report had set forth to prove the presence of a discriminatory effect.[59] The Court had returned to relatively clear pragmatism.

III. There is No Bright Line in *Gingles*

A. The Three Prongs: Separate or Together?

It was four years after 1982 before the Supreme Court commented directly on the congressional amendments to section 2 of the Voting Rights Act. In his opinion for the Court in *Thornburg v. Gingles*,[60] Justice William Brennan proposed a seemingly simple and mechanical, but, in fact, potentially complex and sensitive, test for identifying minority vote dilution. The first "prong" of the *Gingles* test appears to rule out "influence districts" by stating that in cases involving multi-member electoral districts, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[61] This and the other two prongs of the *Gingles* test—minority group political cohesion and white bloc voting at a level sufficient to defeat minority-favored candidates in most instances[62]—originated in the 1981-82 struggle to overturn *City of Mobile v. Bolden*.[63] In testimony before a House Judiciary subcommittee considering amendments to section 2 of the Voting Rights Act, James U. Blacksher, the attorney who argued before the United States Supreme Court on behalf of the plaintiffs in *Bolden*, attempted to answer the call in footnote 26[64] of Justice Potter Stewart's plurality opinion in *Bolden* for a judicially manageable standard for minority vote dilution in at-large election

57. Justice Stewart had resigned, and his replacement, Justice O'Connor, sided with the new majority in *Lodge*, as did Chief Justice Burger and Justice Blackmun.

58. Rogers v. Lodge, 458 U.S. 613 (1982). Actually, Justice White followed the prescient lead of the Fifth Circuit Court of Appeals in Nevett v. Sides, 571 F.2d 109 (5th Cir. 1978).

59. *Rogers*, 458 U.S. at 623-27.

60. 478 U.S. 30 (1986).

61. *Id.* at 50.

62. *Id.* at 51.

63. 446 U.S. 55 (1980).

64. *Id.* at 78.

cases.[65] As Blacksher made explicit, the standard was developed to apply only to at-large elections,[66] a fact also emphasized in Brennan's opinion in *Gingles*.[67]

Justice Brennan stated that he did not mean to decide "what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections."[68] Some courts, however, have sought to extend its application to single-member district racial gerrymandering cases. Is it logical to conclude that Brennan did decide the question—adversely to small minority groups—by implication? Does *Gingles* embody an elementary and general bright line test, invariably applicable to every sort of electoral system?

Some courts and commentators appear to believe that it does.[69] Happy to be supplied with a short checklist that seemingly obviates the need to inquire into the intentions of government officials or to weigh the various and more numerous factors involved in a "totality of the circumstances" inquiry, attorneys, expert witnesses, and judges alike have generally pried the three prongs of the *Gingles* test apart and considered them one by one. As has often been noted, the term "majority" by itself conceals problems: Does it mean a majority of the total population? Of the voting age population? Of voting age citizens? Of registered voters? Of those who actually turn out to vote? What is the legal or logical basis for choosing one of these definitions?

Without minimizing these difficulties, the first *Gingles* prong is more logically understood when it is combined with the other two, that is, with variations in the cohesiveness of both majority and minority group voters over a series of different elections. Considered as one coherent standard, the *Gingles* test is not an abstract, mechanical criterion, but necessarily a

65. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2038-39 (1982) (testimony of James U. Blacksher). A later, more easily accessible presentation of the standard is in MINORITY VOTE DILUTION 231, 234 (Chandler Davidson ed., 1984).

66. MINORITY VOTE DILUTION, *supra* note 65, at 234.

67. 478 U.S. at 46 n.12. Justice Brennan explicitly reserved the question of whether the three-pronged test applied to discriminatory gerrymandering of single-member districts or other situations.

68. *Id.*

69. Romero v. City of Pomona, 883 F.2d 1418, 1423 (9th Cir. 1989); Solomon v. Liberty County, 865 F.2d 1566, 1572 n.4 (11th Cir. 1988); Skorepa v. City of Chula Vista, 723 F. Supp. 1384, 1388 (S.D. Cal. 1989).

flexible, practical one.[70] As minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa. No single point of concentration which is much less than 100% guarantees minority or majority voters an ability to elect. No fixed, situation-free definition of a "majority" or "political majority" is possible. Any attempt to determine what a practical political majority is in any particular circumstance will involve courts in painstaking factual inquiries. The following examples will demonstrate this point.

B. There is No Fixed Definition of a "Political Majority"

Suppose, for the sake of simplicity, that an area is composed of only two ethnic groups, a "majority" group and a "minority" group, and that we have reliable statistics on the proportion of each group among those who actually vote in the district. Suppose also that the election pits a candidate favored by at least a majority of one group (the "majority's candidate") against a candidate favored by at least a majority of the other group (the "minority's candidate"). Which candidate wins is a function not only of the proportion that minority voters form of the active electorate, but also of the levels of cohesion among the two groups of voters.[71] Table 1 illustrates this point in a theoretical electorate.

70. *See* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 354-56 (1992).

71. Elections are about electing candidates, not about meeting some artificial, arbitrary target percentage. In the Ohio State Assembly reapportionment case, Quilter v. Voinovich, 794 F. Supp. 695, 698 (N.D. Ohio 1992), attorneys for the Republican majority on the State Apportionment Board claimed that the Voting Rights Act required them to increase the black proportion of voters in every district that was already represented by a black—packing which, of course, just happened to decrease black, and therefore, Democratic, influence in adjacent districts. The Board majority declared that this was especially important in the 7 of the 11 seats in which African-Americans did not comprise a majority of the population, but extensive white crossover voting allowed black representatives to win. The patent disingenuity of this explanation—Republicans were obviously concerned to elect their own (white) candidates by setting meaningless electoral targets for their opponents—points up the unreality of electoral numbers that have no necessary relation to electoral outcomes.

Table 1. The Relationship Between Majority and Minority Cohesiveness and the Minority Concentration Necessary to Elect a Minority's Candidate

% of Minority Group in District	Level of Majority Cohesion	Level of Minority Cohesion	% For Minority's Candidate
50%	100%	80%	40%
	70%	60%	45%
	100%	100%	50%
	70%	80%	55%
40%	100%	100%	40%
	80%	80%	44%
	70%	80%	50%
	70%	85%	52%
30%	100%	100%	30%
	80%	100%	44%
	70%	97%	50%
	60%	90%	55%
20%	70%	100%	44%
	60%	100%	52%
	60%	80%	48%
	55%	70%	50%
15%	70%	100%	41%
	60%	100%	49%
	55%	60%	47%
	55%	80%	50%
10%	70%	100%	37%
	55%	60%	47%
	60%	100%	46%
	52%	80%	51%

It is easy to see how each row of the table was calculated. Consider the first row. In an electorate equally divided between the two groups, suppose that all of the majority voters support the majority's candidate, while only 80% of the minority voters support the minority's candidate. Then the minority's candidate receives only 40% of the overall vote ($0.5 \times 0.8 = 0.4$). For the other three rows in the equally divided district, we make different assumptions about cohesion and compute the results of the election in a similar manner. In the fourth row, for instance, the minority candidate receives 55% (($0.3 \times 0.5 = 0.15$) + ($0.8 \times 0.5 = 0.4$), and ($0.15 + 0.40 = 0.55$)).

The table demonstrates two striking results: First, even where majorities of each group oppose each other's candidates, it is possible for the minority's candidate to win even when the minority comprises a tenth of

the electorate. As a matter of logic, the statement in the lower court opinion in *Gingles* that "no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority" is simply false.[72] Second, there is no bright line, to use legal terminology, or no "natural cutting-point," to adopt the jargon of social science, to differentiate "control districts" from "influence districts." Fifty percent of the voters is no magic number, nor is forty or thirty or twenty or even ten.[73] The outcome, even in this very simple example, depends on the relative cohesion of the two groups, and not just their proportions of the electorate. If the example were complicated in an attempt to mimic the real world—including differential registration and turnout rates, different age structures, more than two ethnic groups, and variations in cohesion rates in different elections—the results would be even less determinant. If the point of the *Gingles* standard is to assure that members of minority groups have a fair opportunity to elect candidates of their choice, and if it is outcomes, not just demographic goals that matter, then it is not a mechanical set of criteria.

In order to draw any conclusions about a minority's opportunity to elect candidates of its choice, the cohesion of all ethnic groups needs to be empirically determined, not filled in purely by assumption.[74]

C. Evidence from the Real World

The examples need not be merely hypothetical. Other scholars have demonstrated that the proportion of various minority groups necessary to elect a candidate from that minority group varied greatly from time to time and from place to place in the South during the 1960s, 1970s, and 1980s. The fabled "65% Rule"[75] has no empirical validity. In certain states or counties in the South, a black population percentage of 65% was insufficient to elect a black candidate, especially during the first years

72. Gingles v. Edmisten, 590 F. Supp. 345, 381 n.3 (E.D.N.C. 1984).

73. Insisting that 50% of *something* amounted to an immutable prerequisite in an at-large election case, Judge Gerald B. Tjoflat reversed a denial of relief to black plaintiffs who could make up 51% of the voting age population in a single-member district. Solomon v. Liberty County, 865 F.2d 1566, 1574 (11th Cir. 1988).

74. In Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991), for instance, Judge G. Thomas Eisele assumes that white cohesion against a black candidate is high and would rise as the proportion of blacks in a district rises. Otherwise, his conclusion that "the more black voters that are packed into a single legislative district, short of a majority, the less the voting power or influence in the state as a whole" does not hold. *Id.* at 570-71. But he makes no effort to test his assumptions empirically.

75. Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1984), has a capsule description of the rule.

after the passage of the Voting Rights Act in 1965.[76] In others, such as the university communities of Athens, Georgia, Gainesville, Florida, or Durham, North Carolina, it gradually became possible to elect African-American candidates even though the proportion of African-Americans was less than 50%.[77] Summarizing evidence from Boston, Massachusetts, and Chicago, Illinois, as well as Charleston, South Carolina, and Norfolk, Virginia, Kimball Brace and his colleagues conclude that "the 65% Rule for the overall minority population codifies an exception rather than the norm . . . . Determining what is the appropriate population percentage to assure a realistic opportunity to elect a candidate of choice in a given case is a matter of considerable complexity."[78]

In California, the degree of white crossover voting and the percentage of the total Latino and Asian populations who register and vote vary at least as much from area to area as elsewhere in the country. Panel A of Table 2 focuses on the seven congressional districts (of the total of forty-five) in which Latinos or blacks held office in 1990.[79] In none of the four occupied by blacks (districts 8, 28, 29, and 31) did the black percentage of the population exceed 34%. This, in effect, turns the 65% Rule on its head. In none of the three districts with Latino incumbents (districts 25, 30, and 34) did the percentage of registered voters estimated to have been Latinos exceed 41%. In the liberal cities of Berkeley and Oakland, California, black Congressman Ron Dellums won a district in which Anglos actually composed a majority of the population. All of the congresspersons were Democrats, and in all of their districts, Democrats enjoyed substantial registration majorities, but those majorities were markedly less in the three Latino districts. Apparently, the Latino districts were drawn so that Latinos could control the Democratic primaries easily with the hope, which was realized, that non-Latino Democrats would

76. In an attempt to rid the Montgomery City Council of Joe Reed, the leading black politician in the state of Alabama, Mayor Emory Folmar reduced Reed's district to a bit above the lowest black population percentage that some case law said was legal—68%. This action, the district court found, had a discriminatory intent. Buskey v. Oliver, 565 F. Supp. 1473, 1483 (M.D. Ala. 1983). Since a 68% population majority may not have been enough to allow blacks to elect a candidate of their choice in Montgomery at the time (Folmar certainly hoped not), the move may also have been discriminatory purely on effect grounds.

77. Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 111-28 (1991); Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, *in* UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 31-39 (Wilma Rule & Joseph F. Zimmerman eds., 1992).

78. Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 L. & POL'Y 43, 52, 57 (1988).

79. The data was supplied by Pac-Tech Data Research. I want to thank David Ely for his assistance in obtaining it.

rally behind the nominees in November. Black candidates seem to have been able to rely on more ethnic crossover votes within the Democratic primary.

Table 2. Demographic and Political Traits of Minority Congressional and State Assembly Districts in California, 1990

District Number	% Black Pop.*	% Latino Reg.**	% Anglo Pop.	% Democratic Reg.
Panel A: Congressional Districts				
"Black Districts"				
8	25	5	52	63
28	33	8	16	72
29	34	14	4	82
31	29	12	19	71
"Latino Districts"				
25	9	41	13	57
30	1	40	17	58
34	3	40	28	61
Panel B: State Assembly Districts				
"Black Districts"				
13	38	7	29	72
17	11	5	55	63
47	23	18	5	81
48	33	16	5	83
49	40	5	27	72
50	46	6	16	77
54	22	9	38	64
"Latino Districts"				
55	7	40	15	66
56	3	66	6	74
59	1	45	19	61
79	19	16	35	55

* Pop. = population
** Reg. = estimated number of registered voters

The pattern in the eleven California State Assembly districts (of the total of eighty) represented by African-Americans and Latinos was more varied.[80] In one "black" district (district 17), Anglos made up five times as large a group as that of blacks. San Francisco Speaker Willie Brown, however, never had to campaign seriously for his own seat during the 1980s. None of the seven seats held by African-Americans was actually

80. Three assembly districts were represented by men of Portuguese ancestry. In contemporary California, they are not generally considered Latinos.

majority black in population, and only two were as much as 40% black. Of the four districts represented by Latinos, there was only one in which a majority of the estimated registered voters was Latino. In the seventy-ninth district, where only a sixth of the registered voters were Latinos, Pete Chacon won an upset victory over his Republican opponent during the 1970s, when the opponent was fortuitously indicted a week before the general election. The three districts with the highest proportion of Anglos (districts 17, 54, and 79) also had the lowest proportion of Democrats, allowing black and brown candidates, in effect, to leverage their relatively low population proportions by winning Democratic nominations. Then they only had to hold Democratic defections down to be able to cement victories in the general elections.

D. There is No Easy Escape from the Problem of Influence Districts

Thus, a close analysis of the *Gingles* decision itself and a consideration of hypothetical and actual election results demonstrate conclusively that any absolute, general distinction between minority control districts and minority influence districts is illogical, impractical, and legally unwarranted. A court that dismissed a claim of vote dilution on the grounds that a minority concentration did not reach some mystical number—65%, 50%, 40%, or whatever—might well be robbing the group of a realistic opportunity to elect candidates of its choice.[81] Unless courts entertain such suits, they will be arbitrarily and unreasonably denying the groups their rights under the United States Constitution and the Voting Rights Act. To cut off lawsuits with a bright line rule is to deny minority voters equal protection under the law.

Similarly, any hard-and-fast definition of a minimum level of minority population necessary for that group to influence an election is nonsensical. In an attempt to justify its refusal to adopt plans providing for a Delta congressional district where blacks would have a good chance of electing a candidate of choice, for instance, the Mississippi legislature of the early 1980s announced that any black percentage less than forty "would likely result in insensitivity [on the part of the congressperson] to

81. One district court judge rejected a district in which 51% of the registered voters were black on the proportional representation ground that since blacks constituted only 13% of the county's voting age population, they did not deserve to control one seat on a five-seat county commission. Potter v. Washington County, 653 F. Supp. 121, 129-31 (N.D. Fla. 1986). According to Judge Roger Vinson's logic, when Congress rejected a proportional representation standard in 1982, it must have meant to establish proportional representation as a minimal threshold, and when Brennan said a majority in *Gingles*, he actually meant a substantial majority. Any contention that bright line standards reduce leeway for judges to impose their own values has a lot to account for in this opinion.

the black constituency."[82] The legislature created two "stacked" districts that were 45% and 48% black, instead of one 65% district.[83] This is a patent illustration of the use of an entirely arbitrary numerical figure to justify racial discrimination. Naming any minimum level for "influence" would only encourage other authorities to employ the same tactic used by the Mississippi legislature.

IV. Influence District Decisions After *Gingles*

A. The Range of Approaches

Justice Brennan's decision in *Gingles* offered no clear guidance on the problem of influence districts. If the Supreme Court had meant to embrace a bright line definition, it could easily have endorsed those portions of the lower court's decision in the case that explicitly endorsed a threshold of 50%[84] and denied that there could be any "principled basis" for litigating influence districts.[85] If the Court's silence has any implications at all, it suggests that Brennan was not disposed to erect such a mandatory gateway test.

Since 1986, a variety of lower federal court decisions have touched on the problems of influence districts. Fortunately, three of them fully span the range of logic and the various approaches to the problem. The first, *McNeil v. Springfield Park District*,[86] interprets each prong of *Gingles* as a strict mandatory separate threshold; the second, *Garza v. County of Los Angeles*,[87] sidesteps *Gingles* by relying on intent; while the third, *Armour v. Ohio*,[88] blends a brief analysis of intent with a discussion of the totality of the circumstances. A consideration of each case will suggest the advantages and deficiencies of each approach.

B. The Fence Around Springfield Parks

No black had ever served on the seven-member board of the Springfield, Illinois Park District, which was elected at-large. Despite the fact that it was possible to draw a seven-district plan containing one district that was slightly over 50% black in population, and despite the fact that

82. Jordan v. Winter, 541 F. Supp. 1135, 1143 (N.D. Miss. 1982).

83. *Id.* at 1139, 1143.

84. Gingles v. Edmisten, 590 F. Supp. 345, 381 n.3 (E.D.N.C. 1984). The three-judge court did not say what the denominator in the 50% threshold would be—population, voting age, turnout, etc.

85. *Id.* at 381.

86. 851 F.2d 937 (7th Cir. 1988).

87. 918 F.2d 763 (9th Cir. 1990).

88. 775 F. Supp. 1044 (N.D. Ohio 1991).

blacks had won election to the city's school board with white crossover votes, District Court Judge Richard Mills granted summary judgment to the Park Board because the voting age population in the proposed Park district would be only 43% African-American.[89] No evidence of intentional discrimination or of other *White-Zimmer* factors was considered.

The appeals court affirmed, interpreting *Gingles* as requiring an unbreachable 50% voting age population standard in at-large cases,[90] despite the fact that Brennan never clarified whether the majority was to be one of population, or potential voters, or actual voters, or minorities plus crossovers, etc. Noting that the majority threshold requirement had not been enunciated in *White*, *Zimmer*,[91] or the 1982 Senate Report, Court of Appeals Judge Richard D. Cudahy praised it as a newly invented criterion to block unnecessary litigation. "Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections," the judge asserted.[92]

Although Cudahy logically had to believe that a district in which African-Americans made up half of the population was some distance down a slippery slope, he also stated that the *Gingles* threshold required courts to "estimate approximately the ability of minorities in a single-member district to elect candidates of their choice."[93] Yet neither the district court nor the court of appeals made any effort to make such an estimate, and their rejection of a 43% black district implies a very high degree of racially polarized voting, a level often reached in the North only in elections characterized by stark racial appeals. Assuming that blacks and whites turned out equally and that all blacks voted for the same candidate, only 12% of the whites would have to crossover to elect the candidate who was the choice of a united black community.[94] Rather

89. McNeil v. Springfield Park Dist., 658 F. Supp. 1015 (C.D. Ill. 1987).

90. McNeil v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988).

91. *Zimmer*, as Judge Cudahy noted, had declared that the size of the minority population was not "the barometer of vote dilution." *Springfield Park Dist.*, 851 F.2d at 943 n.8 (quoting *Zimmer*, 485 F.2d 1297, 1303 (5th Cir. 1973)).

92. *Springfield Park Dist.*, 851 F.2d at 947.

93. *Id.* at 944. In Rybicki v. Board of Elections, 574 F. Supp. 1082, 1113 (N.D. Ill. 1982), Judge Cudahy had employed a 65% rule for black state legislative districts in Chicago. In Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), Cudahy had castigated a district court for using a 50% voting age population threshold without closely examining "voter registration and turn-out patterns in the Hispanic and black communities.... The district court must first gather and evaluate whatever statistical and other types of evidence are available" in order to establish "historical and recent trends in the electoral patterns of the black and Hispanic communities." *Id.* at 1412-14. The thread of consistency in these opinions is not easily discerned.

94. In the 11 Ohio State Assembly districts that sent blacks to the legislature in the 1980s, the percentage of white crossover voting ranged from 35% to 68%. In 10 of the 11, at

than attempt to determine the likely percentages empirically, through the "intensely local appraisal" called for in *White*,[95] the judges in this case were content to do what they accused the plaintiffs of doing: building "castles in the air, based on quite speculative foundations."[96] That is, they assumed, without evidence, that black cohesion or turnout or white crossovers or some combination of them would be insufficient to elect a black-chosen candidate. Moreover, their arguments strongly suggest that at least some of the *White-Zimmer* factors—which Congress intended judges to apply in voting rights cases—would have been satisfied if a full trial had taken place.

The judges in the *Springfield Park District* case sought to establish the principle that plaintiffs with frivolous cases did not deserve a full hearing. Rather than conducting a "totality of the circumstances" inquiry, as Congress had indicated in 1982 that it wished, the appeals court applied the first prong of the *Gingles* test separately and rigidly to save itself the trouble. Had the district court or the Seventh Circuit considered all three prongs of the test in combination, as Judge Cudahy in effect said courts should do, the judges would have found that minority candidates could win an election in such a district with a minimal degree of white support, and that it was likely, on the basis of school board elections, that candidates who were the choices of the black community could at least sometimes obtain that level of crossover. In other words, had the *Springfield Park District* courts applied the *Gingles* prongs as a unitary test, which is just the standard to which Judge Cudahy's opinion paid lip service, then they would probably have sustained the plaintiffs' claim, even if they had insisted that influence district claims should not be entertained. Springfield blacks could probably have elected a candidate of their choice in a district where they comprised 43% of the potential voters. California and Ohio blacks have managed with much smaller proportions.

C. Demographic Filibustering in Los Angeles

The vast majority of the three-month federal district court trial in the anti-Latino gerrymandering case of *Garza v. Los Angeles County*[97] was devoted to presenting demographic and statistical evidence. *Gingles*,

least 44% of the white voters supported the black candidate. Only one Ohio Assembly district that was over 35% black in population had failed to elect a black candidate since 1970. Quilter v. Voinovich, No. 91-CV-2219, slip op. at 6, 13-14 (N.D. Ohio Mar. 19, 1992).

95. White v. Regester, 412 U.S. 755, 769 (1973).

96. *Springfield Park Dist.*, 851 F.2d 931, 944 (7th Cir. 1988).

97. 756 F. Supp. 1298 (C.D. Cal. 1990).

argued the County's private attorneys, implied that unless an equally populated district with a majority of Latino voters could have been drawn in 1981, no remedy could be afforded, and therefore, the question of liability was irrelevant. Considering it too risky to assume that judges would reject the defendants' argument, counsel for the plaintiffs marshaled a parade of expert witnesses. The experts declaimed not only on ethnic polarization in elections, but also on such questions as how to estimate the proportion of Latino voting age citizens by precinct—figures no census taker had collected—how to project 1980 data forward to 1989, and from which countries the parents of American-born people who designated themselves as "Hispanics" on census forms actually came. At times, the witnesses for the two sides resembled medieval theologians debating the number of angels that could dance on the head of a pin. To many observers, it appeared bizarre that constitutional and legal rights could turn on whether an educated guess on which reasonable and honest statisticians could disagree was 48% or 52%, or perhaps even closer—especially since the practical political effect of either number was likely to be exactly the same.

District Court Judge David V. Kenyon agreed with the plaintiffs that a district with a majority of voting age Latino citizens as of 1989 could be drawn, and that 1989, not 1980, was the proper year at issue.[98] He then added two fall-back positions: Even if a 50% district could not be drawn, plaintiffs had shown that there would probably be enough ethnic crossover voting to elect a candidate who was the choice of the Latino community in a nearly-50% district. And even if that were disputable, the County Supervisors had intentionally gerrymandered districts against Latinos in the past, committing a constitutional violation, as well as a violation of the Voting Rights Act. In other words, the County was liable under at least one of two definitions of discriminatory effect, or if not, then under discriminatory intent.

A three-judge panel of the Ninth Circuit Court of Appeals finessed the 50% issue by resting its decision wholly on the grounds of intent.[99] The court held that, "to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength."[100] Once intent was shown, the appeals court required only "*some* showing of injury" in order to

98. Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal. 1990).

99. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).

100. *Id.* at 769. Although he partially dissented on the remedy, Judge Alex Kosinski, a leading Reagan appointee to the bench, joined the liability portion of Judge Mary M. Schroeder's opinion "without reservation." *Id.* at 778.

"assure that the district court can impose a meaningful remedy."[101] But the necessary injury was just the fragmentation of the core of the geographical area where Latinos concentrated, a fragmentation which the court concluded, without citing any evidence whatsoever, reduced Latinos' opportunities to participate and elect candidates of their choice.[102] Evidently, once the plaintiffs had demonstrated that the area had been intentionally split, violation of the "participate and elect" criterion followed automatically, as a matter of common sense. Thus, *Garza* rejected both the bright line threshold standard and the attempt to render an intent case superfluous by requiring a full showing of effect even after intent had been proven. Whether the electoral district drawn during the remedy phase was an influence district or a control district was something ultimately for the voters and the candidates to decide. In the event, all four major candidates in the initial election using the new district were Mexican-Americans.

D. Carving Up Youngstown

Whenever the Democratic majority on the Ohio State Apportionment Board, which designed districts for the Ohio State House of Representatives in 1971 and 1981, found a large enough minority con-

101. *Id.* at 771. In his dissent in *Bolden*, Justice Marshall argued that if intent were demonstrated in a Fifteenth Amendment case, no effect need be shown, and vice versa. City of Mobile v. Bolden, 446 U.S. 55, 133-55 (1980). In Irby v. Fitz-Hugh, 693 F. Supp. 424 (E.D. Va. 1988), District Court Judge Richard L. Williams rejected the plaintiffs' contention that, once a discriminatory intent was shown for the passage of a law in the 1870s and its maintenance in 1901 and 1956, no current intent or effect need be demonstrated. He asserted, however, that a finding of discriminatory intent would shift the burden of proof to the defendants to show that the system had no unequal effect that would support an inference of current discriminatory intent. Disregarding the *Gingles* factors altogether, he measured the degree of discrimination only against a proportional representation standard. Eighteen percent of Virginia's population was black, and eighteen percent of the state's appointed school board members were black. The Fourth Circuit affirmed on this ground. Irby v. Board of Elections, 889 F.2d 1352 (4th Cir. 1989). In most cases, defendants will have more trouble satisfying a proportional representation criterion.

102. *Garza*, 918 F.2d at 771. In an extreme opinion in Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991), Judge G. Thomas Eisele ruled that only a retrogression in minority voting strength qualified as a discriminatory effect under section 2 of the Voting Rights Act, *id.* at 566; that there was no retrogression in the case, *id.* at 584; that proving intent was insufficient unless effect were also proven, *id.* at 579; and therefore that intent was irrelevant, *id.* at 583. He did not trouble himself to reconcile these legal positions with *White*, *Bolden*, *Lodge*, or the 1982 Senate Report. Strongly contrary is the opinion of Judge Myron H. Thompson in the case of Dillard v. Crenshaw County, 649 F. Supp. 289, 297 (M.D. Ala. 1986), which ruled that if intent were proven for recently adopted electoral rules, no effect need be shown. Similarly, in Buskey v. Oliver, 565 F. Supp. 1473, 1484 (M.D. Ala. 1983), Thompson concluded that "even though a redistricting plan may accurately reflect the voting strength of a minority group, it is still invalid if it was adopted for a racially discriminatory purpose."

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centration to form a majority of a district, they drew one. When the concentration was too small, however, the consultants disregarded it, paying attention, instead, to the desires of white incumbents in the area. Accordingly, districts fifty-two and fifty-three cracked the black community in Youngstown, joining two-thirds of it to one set of white suburbs, and the other one-third to other white suburbs.[103] Although the Board could have drawn two contiguous districts that were 36% black and 1% black, respectively, in fact it drew two with percentages of 25% and 11%. The actual districts split both incorporated and unincorporated areas more than the plaintiffs' proposed 36%/1% districts.[104]

Pointing out that Brennan's opinion in *Gingles* specifically refused to rule out influence districts,[105] and distinguishing contrary lower federal court cases which dealt with at-large elections rather than boundaries between single-member districts,[106] the majority of a three-judge panel ruled for the plaintiffs on both intent and effect grounds.[107] Although Ezell Armour's attorneys did not put on a full-blown discriminatory intent case, the court, in examining in detail all the elements of a "totality of the circumstances" case, did sketch much of the basis for an intent, as well as an effects case. For example, it found a history of extralegal segregation in schools and other instances of discrimination, including a takeover of the city government by the Ku Klux Klan during the 1920s, racial appeals in recent campaigns, racial violence, and racially polarized voting[108]—all of which would be part of an intent case, because they no doubt conditioned the expectations and actions of voters and of key decision-makers in the reapportionment. As did the court in *Garza*, the *Armour* court emphasized that white incumbents helped to engineer a split in the minority community in order to benefit themselves.[109]

Judge Alice M. Batchelder dissented, ignoring the intent portion of the *Armour* majority's decision, citing *Springfield Park District*, but adding nothing to the criticisms of the justiciability of influence districts in the opinion, and offering only a scattershot, self-contradictory critique of the plaintiff's racial polarization analysis. On the one hand, Batchelder

103. Armour v. Ohio, 775 F. Supp. 1044, 1060-61 (N.D. Ohio 1991). It is unclear from the published opinion what criteria the Apportionment Board used to determine whether blacks had a "majority" in an area, or how closely connected black communities had to be to be eligible for consolidation into a district.

104. *Id.* at 1047-48, 1064-67.

105. *Id.* at 1051-52.

106. *Id.* at 1052 n.2; *accord* Emison v. Growe, 782 F. Supp. 427, 436 (D. Minn. 1992).

107. 775 F. Supp. at 1060-61.

108. *Id.* at 1061.

109. *Id.*

proposed to discard as irrelevant to this case analyses of elections other than those for the House; on the other hand, she criticized the plaintiffs' expert for having too few remaining cases on which to rest a solid conclusion.[110] By endorsing the view in *Springfield Park District* that blacks could not elect a candidate in a district in which they did not constitute a majority, Batchelder implicitly assumed that voting was markedly polarized along racial lines. Yet she also asserted that, with 25% of the voters, blacks could control the Democratic primary and win the general election in District fifty-three, a position that assumed a considerable willingness of whites to vote for a candidate endorsed by black voters.[111] Although she concluded her opinion by touting a discriminatory intent standard in Fifteenth Amendment cases, she did not say how a racially discriminatory intent might be proved to her satisfaction or why the majority's evidence of intent was insufficient.[112]

E. The Tale of Three Cases

These three decisions further focus our approach to influence districts. Rigid, absolute thresholds either repulse potentially winning minority candidates, as in *Springfield Park District*, or consume inordinate amounts of the courts' time and the parties' efforts and expense, as in *Garza*. Sensitively applied, the three-pronged *Gingles* test may be *more* complicated and *less* certain than a totality of the circumstances inquiry, whether such an inquiry is characterized as a discriminatory effect test or a discriminatory intent test.[113] After *Garza* and *Armour*, attorneys for plaintiffs may wish at least to add intent components to their cases, and attorneys for both plaintiffs and defendants will have to study history, as well as statistics and demography.

V. Purpose and Effect Standards for Influence Districts

A. A Double Standard

How, then, should courts approach cases in which the proportion of one or more minority groups in a potential district is not overwhelming? In keeping with the Congress' desire in amending section 2 of the Voting Rights Act in 1982, courts should consider both discriminatory effect and purpose standards. The effect standard recognizes that estimates are

110. *Id.* at 1073-75 (Batchelder, J., dissenting).
111. *Id.* at 1088.
112. *Id.*
113. Here, I differ with Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 357-59 (1992).

uncertain and that in this instance, they are subject to eventualities outside a court's control—the willingness of attractive candidates to run, the ability to pull together inter-ethnic coalitions, the degree of involvement of various groups in the political system. The discussion of intent reflects an attempt to make that inquiry as systematic as possible.

B. Proving Effect in Influence District Cases

Decrying the "artificiality" of the distinction between "influence" and "control" districts, Justice Sandra Day O'Connor asserted in her concurrence in *Gingles* that:

> if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.[114]

The *Gingles* standard, as interpreted in this Article—that is, as a single test, not as three separate ones—would require just that, with one amendment: In areas where there is more than one minority group, the potential for crossovers between minority groups should also be considered.

In practical terms, the first question to ask in district boundary cases is whether an area of minority group concentration has been split.[115] Whether one or more places qualify as such an area must be determined by the specifics of each case. Some general guidelines for qualification should be that the locations are: (1) geographically close together; (2) socioeconomically related; and/or (3) that the jurisdiction has traditionally joined them together into the same district or placed comparably close areas into one district. For instance, in Monterey County, Califor-

114. 478 U.S. 30, 89 n.1 (1986). In Chisom v. Roemer, 111 S. Ct. 2354, 2365, 2371-72 (1991), Justices John Paul Stevens and Antonin Scalia disagreed sharply over whether the "participate and elect" standard is unitary—i.e., whether the fact of unequal opportunity to participate in elections is sufficient by itself to violate the Voting Rights Act. As Scalia points out, Stevens' majority view that Congress meant the phrase to be a unit may imply that minorities that cannot show with certainty that they can elect candidates in proposed districts will be denied any remedy. But once it is realized that there is no clear dividing line between influence and control, the controversy dissolves. There is merely a continuum of more or less participation. Had Stevens and Scalia paid more attention to O'Connor's footnote in *Gingles*, there would have been no reason for their charges and countercharges. Judge Arnold put the point simply and logically in Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989): "If I can vote at will but never elect anyone, my political ability is less than yours." *Id.* at 204.

115. Here, I agree with Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 372 (1992).

nia, the nearby cities of Seaside and Marina and the adjacent and socioeconomically related military base of Fort Ord were divided among four supervisorial districts by the reapportionment of 1991. Rejecting a proposed district in which African-Americans constituted 20% of the population and Asian/Pacific Islanders 16%, the supervisors instead adopted a plan in which neither made up more than 10% of any district.[116] Seaside, Marina, and Fort Ord were joined in a school district, and although they had been placed in different supervisorial districts, other areas that were much farther apart had long been included in the same supervisorial districts within the county. Such a fragmentation would establish either the beginnings of a discriminatory effect case or, under *Garza*, the necessary injury in a discriminatory intent case.

Fragmentation would also demonstrate foresight in a discriminatory intent case because in recent reapportionments planners have calculated and highlighted the ethnic percentages in different districts under alternative proposed boundaries. Therefore, the decision-makers must have been aware of the ethnic consequences of their actions.[117] The current technology and self-consciousness of reapportionments guarantees that any fragmentation was foreseen. The country's long history of discrimination against minorities in politics suggests that the redistricters who severed minority areas meant to treat minorities with less concern and respect than they did whites.

The second step in a discriminatory effect case would be to determine, through an analysis of past voting records in the area, whether a minority concentration at the level of the proposed district would significantly improve the opportunity of the dominant minority group, in coalition with some members of other groups, to elect candidates of its choice. If under the previous or status quo arrangement—either an at-large system or single-member districts with different boundaries—the minority group had regularly been able to elect candidates of its choice, including members of the minority group itself,[118] then it would be extremely diffi-

116. J. Morgan Kousser, Tacking, Stacking, and Cracking: Race and Reapportionment in Monterey County, 1981-1992 (Sept. 9, 1992) (unpublished report written in connection with Gonzalez v. Monterey County, 808 F. Supp. 727 (N.D. Cal. 1992)).

117. *See, e.g.*, Jeffers v. Clinton, 740 F. Supp. 585, 589 (E.D. Ark. 1990), for a judicial example of this reasoning.

118. American political history overwhelmingly demonstrates that, other things being equal, members of particular ethnic groups mostly prefer to elect "one of their own." It was true of the Irish in the 19th century, and it is true of African-Americans and Latinos today. *Cf.* Jeffers v. Clinton, 730 F. Supp. 196, 198 (E.D. Ark. 1989). When the electoral structure is sufficiently discriminatory and the level of racial bloc voting by the dominant group is sufficiently high, however, blacks, Latinos, and Asian/Pacific Islanders may have no choice but to vote for Anglo candidates. It would be a sad irony if such white-on-white elections were cited

cult to make out a discriminatory effect case. If, on the other hand, there was evidence of potent, but generally unsuccessful coalitions between members of different minority groups or between one or more of the groups and the majority group, then a case might succeed. In considering likely future electoral success, one should, of course, be aware that changes in the demographic mix may well alter perceived electoral opportunities: If minority candidates feel that they have little chance to win, few or no serious minority candidates may run; whereas, when they suddenly have a greatly enhanced ability to be elected, the number of serious minority candidates and the extent of minority participation may rise dramatically.[119] Therefore, a failure of small minority groupings to produce minority candidates is not, as Judge Eisele implies in his partial concurrence in *Jeffers v. Clinton*, proof that voting will not be racially polarized in districts with larger proportions of minority citizens.[120] In partisan contests, the proportion of the dominant minority group necessary to have a high probability of effectively controlling the district might well be lower than in nonpartisan elections, because a percentage well below 50% of the voters could comprise a majority of the dominant political party. In such an instance, the crucial question would be the likely extent of white or other group defection from minority-endorsed party nominees in the general election.

As argued in Part III of this Article, there is no absolute, situation-free threshold for the ability to elect candidates of choice. An acceptance of this relativism solves one of the most common problems raised about influence districts. Suppose a planner has the option of creating two 20% minority districts, or one 30% and one 10% district. What should the planner do, and what is she legally required to do? This Article implies that, other things being equal, the planner should adopt the 30%/10% solution, rather than the 20%/20% solution, because, first, it mini-

as conclusive evidence that minorities had attained their political goals by voting for the winning white. Such a counting rule would, in effect, reward the most discriminatory places for their stalwartness in bloc voting and erecting effective legal barriers. For examples of such a rule, *see* Judge Chapman's dissent in Collins v. Norfolk, 883 F.2d 1232, 1247 (4th Cir. 1989); Southern Christian Leadership Conference v. Evans, 785 F. Supp. 1469, 1473-76 (M.D. Ala. 1992).

119. Although there had not been a serious Latino candidate for supervisor in Los Angeles County from 1958 to 1990, after a new electoral district was drawn in the remedy phase of *Garza*, all of the major candidates were Mexican-Americans. In Monterey County, after two black candidates for supervisor finished first in primary elections, but lost in runoffs in 1976, and the districts were redrawn to "whiten" each in 1981, no blacks ran for supervisor, although two black politicians indicated in court documents connected with Gonzalez v. Monterey County, 808 F. Supp. 727 (N.D. Cal. 1992), that they would have run during the 1980s had the district lines been drawn more favorably.

120. Jeffers v. Clinton, 730 F. Supp. 196, 274-77 (E.D. Ark. 1989) (Eisele, J., concurring).

mizes fragmentation, and second, it improves the opportunity of members of the minority group, in coalition with some members of other groups, to elect candidates of their choice, and perhaps even makes that election rather likely.

The relativistic position also helps to solve the mirror image of the influence problem, the "packing" dilemma. What criteria should a planner or court adopt to decide whether a minority group's overall political power has been decreased by concentrating them in "too few" districts? Whereas an absolute standard would compare the concentration to some arbitrary level—65%, 50%, or whatever—and condemn a plan that "wasted" minority votes by creating districts in excess of that level, a relativistic approach would consider the proportion necessary to elect a candidate of choice with a high probability in a particular situation at a particular time. In some places, the level might be in the range of 70-80%; in others, 20-30%. And the "excess" minority populations left over after the drawing of highly concentrated districts would not be considered as legally or politically worthless, but as providing the basis for possibly influential groupings. As part of a remedy for illegally packed districts, courts should create districts in which minority groups can exert as much influence as possible.

Aside from the *Gingles* test, should there be any role for the other *White-Zimmer* factors in a discriminatory effect case? This Article suggests that attorneys and judges would be well advised to include a discussion of them for two reasons. First, they bear on the probability that members of a minority group will be able to elect candidates of their choice.[121] The history of discrimination and its continuing consequences in an area affects the expected cohesiveness and participation levels of members of a minority group. A slating process or racial appeals in campaigns may affect the level of crossovers between majority and minority groups. Discriminatory electoral devices may facilitate or retard the racial polarization of politics among different groups and therefore affect expectations of the degree of crossovers in a changed system. For instance, a minority community that is submerged in an at-large election system or in districts that fragment it may not foster minority candidates, but could be expected to do so under a fairly drawn single-member district system. The effects of this shift on voter and candidate behavior should be taken into account in assessing the possibility that minority communities would be able to elect candidates of their choice under a

121. Compare Judge Tjoflat's prudential advice in Solomon v. Liberty County, 865 F.2d 1566, 1573 n.8, 1581 (11th Cir. 1988).

proposed system.[122] Second, the three-pronged test in Brennan's opinion in *Gingles* commanded only five votes. Justice O'Connor's concurrence, which opted for a totality of the circumstances approach, attracted three more votes. With the changes in the Supreme Court's makeup—two members from each side no longer serve—it is unclear how secure the *Gingles* test is as a precedent.

Either a *White-Zimmer* analysis or a sophisticated version of the *Gingles* test will require considerable attention to local detail, and the outcome of a discriminatory effects case will not be obtained by mechanically filling in a few demographic statistics. This is as it should be, for the problems of racial relations in American politics are complex and extremely varied in our most variable, ever-changing country. To try to impose a single uniform solution is to ignore both our history and our contemporary diversity.

C. The Search for Intent Can Be Systematic

Inquiries into discriminatory intent have a worse reputation than they deserve. After laying the basis for a discriminatory intent case in his opinion in *Ketchum v. Byrne*,[123] Judge Cudahy condemned the process of proving intent as "inherently speculative" and commended the 1982 Congress for removing "the elusive and perhaps meaningless issue of governmental 'purpose' " as a prerequisite in voting rights cases.[124] Bernard Grofman, Lisa Handley, and Richard Niemi declare that the standard for proving intent in voting rights cases may be a "moot issue" after the 1982 amendments, because Congress concluded that "intent was so difficult to prove" and because "proving racism" was "burdensome and racially divisive."[125] In a report for *Gonzalez v. Monterey County*, Handley essentially argued that discriminatory intent is utterly irrelevant in voting rights cases, because even if one demonstrates a racially discriminatory intent, one must still make the same showing of discriminatory effect as if one had ignored discriminatory intent altogether. This is contrary not only to the Ninth Circuit's ruling in *Garza*, but also to logic and Handley's earlier writings.[126] It is instructive to note that the most

122. The Fifth Circuit's failure to consider this possibility vitiates its argument in Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989).

123. 740 F.2d 1398 (7th Cir. 1984).

124. *Id.* at 1408-10.

125. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 42, 52 (1992) [hereinafter MINORITY REPRESENTATION].

126. Lisa R. Handley, Proving Injury in an Intentional Discrimination Suit: A Report for Gonzalez v. Monterey County Board of Supervisors 2 (Oct. 7, 1992) (unpublished report written in connection with Gonzalez v. Monterey County, 808 F. Supp. 727 (N.D. Cal. 1992))

scathing criticisms of discriminatory intent contentions have recently come from the right, not the left, of the political spectrum. In his dissent in the Louisiana "creation science" case, for instance, Justice Antonin Scalia asserted that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."[127]

Such criticisms ignore the fact that an inquiry into discriminatory effect may be highly uncertain, as argued above, and that an examination of discriminatory intent may be systematic, as demonstrated in the *Garza* case, and as shown at length in a paper based on the author's testimony in *Garza*.[128] The following briefly summarizes the nine intent factors described in more detail in the author's above-referenced paper, as well as the rationales for each factor. Together, they show how one can approach such questions more objectively.

The first factor is models of human behavior in particular situations, which are often drawn from experience or research. For instance, have lines between electoral districts been used elsewhere to make it more difficult for members of protected minority groups to elect candidates of their choice? The answer is, of course, yes, and the more historians and expert witnesses learn about such instances, the more they find racially and politically discriminatory purposes and effects in reapportionment. During the "First Reconstruction" after the Civil War—just as soon as African-Americans constituted a large enough enfranchised group to have a major influence on elections in the United States—whites began to draw district lines to dilute black political power. The *Garza* case showed conclusively that racial gerrymandering takes place in contemporary California. It is also the tritest of truisms to note that politicians' self-interest is never closer to the surface than during reapportionment. When those who do the redistricting are all Anglo, and members of minority groups form large groups of voters, one should at the very least be on guard for the possibility of discriminatory acts.

Such models, whether explicit or implicit, whether based on scholarship or experience, whether acknowledged or unacknowledged, do affect where the analyst starts, and the only honest thing to do is to be conscious of the fact and to admit it. Someone who believes that politicians

[hereinafter Handley, Proving Injury]. *Cf.* Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990); Lisa Handley, The Quest for Minority Voting Rights 250 n.28 (1991) (unpublished Ph.D. dissertation, George Washington University); MINORITY REPRESENTATION, *supra* note 125, at 114, 143 n.30.

127. Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Similarly, *see* Chisom v. Roemer, 111 S. Ct. 2354, 2376 (1991) (Scalia, J., dissenting).

128. J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591 (1991).

are always selfless altruists who draw district lines thinking only of the public good, and never of the effects on their own political fortunes and those of their partisan or ideological allies, will expect to find only disinterested motives in particular cases. The most hard-boiled political consultants claimed during the *Garza* case to have acted entirely selflessly. More skeptical observers do not take such statements at face value.

The second factor is the historical context. Were racial issues or political campaigns by members of minority groups important at the time and place? In *Garza*, for instance, it was extremely significant that there was special redistricting in 1959 that resulted in a large shift of Anglo voters in West Los Angeles, Beverly Hills, and West Hollywood, from the Fourth to the Third District. This came less than a year before the census was taken and just after a very close contest in the Third District in which an Anglo candidate defeated a Mexican-American candidate.

A third factor may be the exact text of a law or the exact lines of a redistricting, and a fourth is basic demographic facts. To what extent did the district lines fragment minority communities? Here, the discriminatory intent and effect cases overlap considerably. How many members of relevant minority groups were there, how concentrated were they, and what were the trends in the population? In *Garza*, the rapid growth of the Latino population in an area split between two supervisorial districts was an important fact that did not escape the attention of those who drew district lines. During the redistricting in Monterey County in 1991-92, the wide array of plans, all with demographic totals neatly attached, as if to prove that ethnic considerations could never have been missed by any participant, shows just how ethnically self-conscious the line-drawing by the all-white board was.[129] Every proposed district line tells a story.

Two basic political facts that constitute the fifth factor are the number of minority group members elected and the approximate extent of racial polarization among the voters. The former is a measure of discriminatory effect, and the latter, insofar as it is widely known, can be assumed to inform the decisions of those who design electoral structures. For example, in Los Angeles County before 1991, it was well known that no Latino had served as a supervisor in this century, and it was widely understood that Latino candidates had little chance to win elections in overwhelmingly Anglo districts. Therefore, redistricters had to have been well aware that districts that contained large majorities of Anglo

129. J. Morgan Kousser, Tacking, Stacking, and Cracking: Race and Reapportionment in Monterey County, 1981-1992 (Sept. 9, 1992) (unpublished report written in connection with Gonzalez v. Monterey County, 808 F. Supp. 727 (N.D. Cal. 1992)).

voters were extremely unlikely to elect candidates that were the first preferences of Latinos. In Monterey County, no black or Latino has been elected supervisor in this century, although two black candidates threatened to win during the 1970s, before the 1981 reapportionment.

The sixth and seventh factors are the background of key decision-makers and other actions that they performed. Were they all white? Did they allow all minority groups a real forum in which they could express themselves on the decision? What other policies that affected minority groups did the decision-makers favor and carry out?

Sometimes, decision-makers will make what are termed "smoking gun" statements, and they constitute the eighth factor. When a "numbered post" system was substituted for a "free-for-all" at-large election system in Memphis, Tennessee in 1959, a newspaper article on the relevant bill, based on interviews with legislators, was headlined "Bill. . .Has Racial Purpose."[130] The story went on to explain at length just how blacks would be disadvantaged by the change. In California in the late twentieth century, politicians are generally too careful to make "smoking gun" statements.

State policies and formal and informal institutional rules constitute the final factor. If a locality is merely following a mandated state policy (for instance, one providing for at-large elections for all cities of a specified size range), then it is difficult to attribute any particular motive to the locality. Departures from usual rules or practices may hint at ulterior motives.[131] In a recent case decided by the United States Supreme Court, boards of county supervisors in Alabama, after the first election of a black board member, changed the rules to strip individual board members of powers that they had previously possessed.[132] Although the Court decided that such a move did not have to be cleared by the Justice Department, it seems likely that it could be challenged as intentionally discriminatory under section 2 of the Voting Rights Act or the Fourteenth Amendment. In reapportionment cases, inconsistency in dealing with different areas or groups, or inconsistent or frivolous justifications of various decisions, may provide evidence of ulterior, possibly racial motives.

130. MEMPHIS PRESS-SCIMITAR, Feb. 19, 1959, at 4.

131. *See* McMillan v. Escambia County, 638 F.2d 1239, 1245-46 (5th Cir. 1981), on the switch from single-member districts to at-large elections in the wake of the outlawing of the white primary.

132. Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992).

D. Testing Other Explanations

Arraying the evidence under these nine rubrics is not the end of the inquiry. Deciding that racial motives played a significant role in shaping an electoral rule or boundary requires one to set out and assess other, competing rationales or explanations for the device. What is the best warranted explanation?

Those who wrote the electoral rules and lawyers defending them will probably suggest rationales or explanations besides racially discriminatory ones. Even if they do not, it is nearly always possible to formulate superficially plausible hypotheses of good intentions (e.g., they were trying to help minorities) and other intentions (they wanted to preserve city boundaries, draw "compact" districts, or insure majoritarianism as an abstract principle). Every such theory should be stated as clearly as possible and all evidence for and against all of them should be arrayed as fairly and objectively as the analyst can manage within the time and space available. (If an expert leaves anything out, surely opposing lawyers will fill it in.) In the end, the expert and ultimately the judge must weigh the evidence and decide whether the thesis that the rule makers intended to discriminate is well-founded. Discrimination need not have been their sole or primary motive, but it must have been an important one or one necessarily entailed by an important one. It may have been possible to protect white incumbents, for instance, only by disadvantaging potential minority challengers.[133]

Whatever the outcome, the determination of discriminatory intent will always be a matter of judgment (isn't that what judges are supposed to do?), rather than a mechanical task, and the process of sifting the evidence will be exactly the same whether the minority group constitutes 75% of a population or 10%. In determining discriminatory intent, there is no difference whatsoever between influence districts and control districts.

E. A Defense of the Influence Concept

Bright line standards circumscribe, but preserve rights. Some in the voting rights community[134] fear that recognizing the unrealistic nature of

133. Rybicki v. Board of Elections, 574 F. Supp. 1082, 1109-10 (N.D. Ill. 1982); Garza v. County of Los Angeles, 918 F.2d 763, 768 n.1 (9th Cir. 1990).

134. This part primarily responds to comments made at the University of San Francisco Voting Rights Symposium, Nov. 6-7, 1992, and transmitted to me by Nancy Ramirez. I want to thank Nancy for her assistance in this respect, but reserve for myself any criticism for errors in the transmogrification of the arguments. I have stated the arguments in my own words and have attempted to develop them logically.

such a standard in this instance will endanger rights already seemingly won—that Anglo judges may decide that it is "best" for minority voters to have their influence spread widely, rather than being able to control some districts, or that they may rule that the decision on what is best for minorities should not be made by judges, but should properly be left up to elected Anglo politicians. Better to force a 49% minority or a 10% minority to fend for itself, the argument goes, than to hazard the loss of minority representation by stressing that influence is a relative, not an absolute concept, and suggesting that judges must scrutinize the political process carefully and realistically in order to protect minority rights in accordance with the Constitution and the laws. Judges want a simple test—don't puncture their illusions!

Thus, Grofman, Handley, and Niemi proclaim that "the *Gingles* three-pronged test places the focus on a set of relatively clear, objective criteria, creating a manageable standard with a list of critical factors that is both small and closed ended."[135] They fear that if influence district claims are allowed, "minorities might be harmed more than helped. . . . The concept of influence is murky. . . . Where there are 'electability' claims at issue, there is a natural threshold. Without such a threshold, how does one decide whether shifting minorities from one district to another increases or decreases their overall influence?"[136]

In a report for *Gonzalez v. Monterey County*, Handley rejects a 50% population standard, but proposes the use of a sophisticated bright line test. To merit relief, Handley suggests plaintiffs must be able to show that they could garner enough minority and white crossover support to win a future election in a reconfigured district.[137] For instance, suppose a district could be drawn in which minority voters comprised 20% of the population. Consider the range of percentages of majority and minority cohesion in a 20% district in Table 1, above. If in past elections in a district in the area with less than 20% minority voters, 60% of the majority voters had voted for the majority-preferred candidate, and 100% of the minority voters had voted for the minority-preferred candidate, then if the same cohesion levels continued in the 20% minority district, the minority-preferred candidate would obtain 52% of the vote. In that case, Handley would say that the minority plaintiffs were at least potentially eligible for relief, depending on other facts in the case. If minority cohesion in the previous election had been only 80%, however, the minority-preferred candidate, under the same assumptions, would be ex-

135. MINORITY REPRESENTATION, *supra* note 125, at 117.
136. MINORITY REPRESENTATION, *supra* note 125, at 117-18.
137. *See* Handley, Proving Injury, *supra* note 126.

pected to win only 48% of the vote, and Handley would say that plaintiffs had not met the threshold test and deny them any relief.[138]

But as Grofman, Handley, and Niemi are well aware,[139] there are no natural thresholds, and the ability of social science to predict future outcomes is imperfect. Influence is a continuum, not an absolute. Unless there is a revolution in theories of human behavior, it will never be possible to establish a precise point, even in a particular jurisdiction at a particular time, above which one group is guaranteed an election, and below which, it will certainly lose. Even though Handley's proposed test for influence districts is much more subtle and flexible than a pure demographic criterion, it is still more sharp-edged than the predictive capacity that social science allows. There are just too many variable factors—the availability of skilled candidates, national or state electoral trends, the temperature of racial issues at the time, etc.—to be able to forecast future political outcomes within a very few percentage points. The best we can do is to say that, up to the range at which districts are "too packed" with members of one group, every increase in the group's proportion is an increase in its influence, other things being equal.

Second, good theories are not based on fictions. If a proposed bright line is not as clear as its proponents contend, the legal community will discover that fact eventually, placing the whole enterprise at risk. Better to acknowledge a frailty now and deal with it than to hazard a collapse later.

Third, as stressed above, small clusters of minorities need and deserve protection at least as much as large clusters. As voters from different ethnic groups become more willing to cast crossover votes, the opportunities for members of minority groups to be elected will be enhanced, not damaged by drawing influence districts. If African-American, Latino, and Asian aspirants can run not only in majority-minority districts, but also in districts that are, for example, 20-49% minority, then over the long run, there will be *more*, not *fewer* members of these groups in office.

138. During the course of the *Gonzalez* case, plaintiffs drew a district that was 23% black in total population. Using statistics from the campaign of the last black candidate in the major part of the district, which took place in 1976, Handley contended that it would take a district that was 26% black to guarantee a black candidate in the 1990s a majority, and argued that therefore plaintiffs should be denied relief. In fact, if one included only those areas with high white crossover voting in 1976, which formed nearly all of the plaintiffs' proposed new district, the prediction would be that a black candidate (under the same circumstances as in the 1976 election) would receive 49% of the vote in a 23% black district. It would seem extremely arbitrary to deny relief on the basis of numbers that were at once this close and this uncertain.

139. MINORITY REPRESENTATION, *supra* note 125, at 120.

Fourth, influence districts encourage interracial coalitions, and a standard that concentrates minority groups diminishes the probability that they will forever be condemned to be distinctly junior coalition partners. If members of minority groups are scattered randomly across districts, then residual racism among Anglo voters and the present effects of past and present ethnic discrimination will continue to hamper minority political power. If, instead, we recognize that members of minority groups continue to need special safeguards to overcome persisting discrimination and racism, and we concentrate minority voters to provide those safeguards, then politicians of all races will be less able to ignore minority voters or take them for granted even in districts where the minorities will probably not be able to win outright.

Those who favor a bright line standard to create heavily minority districts err for the same reason as those who oppose any judicial or administrative intervention in matters of electoral structure at all. Both treat racism or racial discrimination as categorical, rather than as interval-level variables.[140] But the history of inter-ethnic attitudes and behavior in the United States and elsewhere shows that racism or ethnocentrism is not like a simple light switch, either off or on, but like a more sophisticated dimmer switch.[141] Proponents of control districts think that in the vast majority of places, the racist light is still completely on; their opponents, that it is usually completely off. Racism has faded markedly, but by no means totally, in the United States since the 1940s. Promoting judicial and administrative procedures that require practical, particularized appraisals and remedies that include districts in which minorities will enjoy various degrees of influence recognizes that racism is a variable phenomenon and treats it with a measured and serious response.

Fifth, the bright line standards now in effect neither offer adequate protection against determined redistricters, attorneys, and judges, nor do the standards inhibit judges from deciding that minorities are better off fractured. In his partial concurrence and dissent in the two *Jeffers v. Clinton* cases, Judge G. Thomas Eisele repudiated an "ability to elect"

140. ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 9-10, 131-33, 155, 196, 238-39, 242 (1987).

141. On the variable nature of American racism, *see* DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT (1991); J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS (1986); J. Morgan Kousser, *Before* Plessy, *Before* Brown: *The Development of the Law of Racial Integration in Louisiana and Kansas*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 213 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

standard completely,[142] and when he grudgingly applied it, he applied it bizarrely. In one area in which blacks comprised 45% of the voting age population of a district, Eisele ruled this to be a minority-controlled district without inquiring into registration, turnout, or cohesion levels, because 5% or more of the white voters usually crossed over to vote for a black candidate. By mechanically applying a strange interpretation of the *Gingles* test, Eisele denied blacks the practical ability to control elections.[143] In other places, two or more black areas that were close together, but had never been placed in the same electoral district before, were proposed to be joined to create black majority districts. Even though plaintiffs proved that black candidates usually lost in the areas because of white bloc voting, and that blacks in most of the parts of the districts had backed the same candidates in the past, Eisele still favored denying them relief because they could not show that the newly joined black communities would be politically cohesive with each other.[144] This amounts to a judicial "catch-22": to merit relief, one must demonstrate minority cohesion, but to demonstrate cohesion, one must first have obtained relief. Thus, Eisele exploited the formalistic character of the *Gingles* test to uphold the racial and political status quo. As it stands today, then, the *Gingles* test, if formulated adversely enough, can deprive minorities even of "control" districts.

Nor does *Gingles* stop judges from turning an "ability to elect" standard into something else. Immediately after quoting *Gingles*, Fifth Circuit Judge Thomas G. Gee in a 1988 case announced, without citing further case law, what might be called an "ability to compete" standard: "When we ask how far is far enough for courts to intervene in the political process, we must ask whether any group is systematically prevented from competing and coalescing with other groups to produce a realistic possibility for electoral victory. If groups are not systematically impeded in competing, courts must not interfere in the game of politics."[145] Despite the fact that the 21% black town of Oxford, Mississippi had never elected a black alderman, and that Mississippi had a notorious history of

142. "What is required, what all must insist upon, is fair and equal opportunity for all to participate in the political process—nothing more, nothing less. That is what the Voting Rights Act and our Constitution require." Jeffers v. Clinton, 740 F. Supp. 585, 626 (E.D. Ark. 1990) (Eisele, J., dissenting).

143. Jeffers v. Clinton, 730 F. Supp. 196, 251-52 (E.D. Ark. 1989). Judge Eisele's mathematics are as bad as his logic. If 5% of the 55% of the potential voters who are white joined the 45% of the voters who are black, the black-chosen candidate would get only 48% of the vote, not 50% ($(.05 \times .55 = .0275) + .45 = .4775$).

144. *Id.* at 269-77.

145. Houston v. Haley, 859 F.2d 341, 348 (5th Cir. 1988).

racism (which Judge Gee dismissed by referring to "the irrelevant criterion of race"),[146] the judge ruled that a district that was 54% black in population—but surely much less in voting age population, registration, and turnout—was legal. Unless this standard were interpreted to mean an *equal* ability to compete, it is difficult to see how, under it, any electoral structure could be invalidated under section 2 of the Voting Rights Act or the Fourteenth or Fifteenth Amendments.

Perhaps worst of all, the Republican majority on the 1991 Ohio State Apportionment Board formalistically and disingenuously interpreted the first prong of *Gingles* to *require* them to pack the maximum number of blacks into individual state assembly districts.[147] Completely disregarding a level of white crossover voting that in 1990 allowed seven of the eleven African-American state assemblypersons to be elected from districts in which less than a majority of the population was black—that is, considering the prongs of *Gingles* in isolation from each other—the Republicans employed *Gingles* in what two of three federal judges who heard the case recognized as an intentional effort to *reduce* the influence of black voters over the election of the legislature as a whole. No party to the case contended that race could not be taken into account, or that the state was not obliged to create districts in which black voters would have an equal opportunity to elect candidates of their choice. The problem was the definition of "control." The Republicans wanted judges to blind themselves to the political reality that in contemporary Ohio, a district that is 35% black in population is extremely likely to elect the first choice of the black community, but, instead, to assume that *Gingles* dictated a 50% standard. The result would be to "waste" the maximum number of black votes, thereby diminishing both black and Democratic power. In other words, the Republican goal of reducing Democratic influence could only be accomplished by reducing the influence of blacks (at least 85% of whom in Ohio regularly voted Democratic). That is, as has so often been the case in American history, racial and partisan motives were inextricably intertwined.[148]

146. *Id.* at 343 n.1.

147. Quilter v. Voinovich, 794 F. Supp. 695, 699 (N.D. Ohio 1992); and Quilter v. Voinovich, 794 F. Supp. 756, 756-57 (N.D. Ohio 1992). Further facts about this case will be drawn, without further citation, from these opinions and from the briefs and oral argument before the United States Supreme Court. *See* discussion of Supreme Court decision *infra* part V.F.

148. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

F. A Unanimous Non-Decision

In a short unanimous opinion in the Ohio apportionment case that left open most of the broadest questions, Justice Sandra Day O'Connor overturned the district court decision, sustaining the Republicans' actions without accepting their rationale.[149] The Voting Rights Act, O'Connor ruled, did not *require* the state to draw districts in which a minority group constituted a majority of the population (as Republicans had contended), but neither did it *prohibit* the state from doing so, unless critics of the apportionment proved that doing so would have a discriminatory effect or that it was adopted with a discriminatory intent. The district court had erred by placing the burden of proof on the state, instead of the plaintiffs, and the evidence of minority "packing" presented in the lower court's opinion was insufficient to prove a violation of the law.[150] Even more serious was the lack of racial bloc voting demonstrated on the record. In the district court, Judges Nathaniel R. Jones and John W. Peck had used the fact that there were substantial white crossover rates in state legislative races involving black candidates to argue that Republicans had knowingly and unnecessarily packed blacks. In contemporary Ohio, African-Americans could elect candidates of their choice in districts that contained much smaller percentages of black voters.[151] Yet the same facts proved to O'Connor that there was no racial bloc voting by whites, and thus, under the third prong of *Gingles*, no violation.[152] Furthermore, the eight Republican and one Democratic Justices found the district court's skimpy opinion on intentional discrimination unconvincing. The high court placed particular emphasis on the fact that the Ohio NAACP had endorsed the Republican plan.[153]

On two larger questions, the Supreme Court specifically declined to rule. Defining influence districts as "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice," O'Connor assumed only "for the purpose of resolving this case" that such claims were cognizable under section 2 of the Voting Rights Act. But following *Gingles*, she did not actually decide the issue.[154] Moreover, although during oral arguments Justice

149. Voinovich v. Quilter, 61 U.S.L.W. 4199 (1993).

150. *Id.* at 4202.

151. Quilter v. Voinovich, 794 F. Supp. 695, 698 (N.D. Ohio 1992).

152. Voinovich v. Quilter, 61 U.S.L.W. at 4203.

153. *Id.* O'Connor's opinion largely ignored the more extensive evidence of racial intent in the brief of the counsel for the Democrats. *See* Appellees' Brief at 19-21, Voinovich v. Quilter, 61 U.S.L.W. 4199 (1993).

154. *Id.* at 4200-01.

Antonin Scalia had questioned whether race could be used as a criterion for drawing district lines at all unless a violation of the Voting Rights Act were first proven, neither the Democrats, nor the Republicans, nor the district court, nor the Justice Department had raised the issue. O'Connor therefore let it rest undecided for the moment.[155]

By allowing influence district claims to ripen further and by not granting majority-minority districts as such any special status, O'Connor adopted an approach not inconsistent with the analysis in this Article. To be sure, the Justice treated the *Gingles* factors separately, but the fact-oriented inquiry into allegations of racial packing that she briefly suggested implies that they must be appraised together. Creating majority-minority districts, she recognized, might or might not be discriminatory. "Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case."[156]

This statement exposes perhaps the chief deficiency of the case presented by the Democrats and adopted by the majority of the district court—it did not provide enough facts about the non-packed districts. As one of the Justices remarked to the Democrats' attorney during oral argument, "really you should focus on the other districts to see if they're diluted, because the packing itself is not enough, as I understand your theory."[157] Blacks, after all, could control the packed districts. It was in the other districts and the state as a whole that their influence was reduced. Why was it reduced? Because in districts below 35% black, few or no black candidates had been elected—*prima facie* evidence of white racial bloc voting. Thus, more detailed attention to the districts not represented by black legislators would have gone a long way toward satisfying the third prong of *Gingles*, and it would have required consideration of all three parts of the test together.

G. The Test of Tradition

The discriminatory effect and intent approach outlined above accords with tradition, logic, and much, though not all, recent case law. As for tradition, the only period in which the courts and Congress accepted mechanistic, bright line tests was the period of massive discrimination and black disfranchisement. Conversely, during both

155. Transcript of Oral Arguments before the Supreme Court in Voinovich v. Quilter, at 8-10, 17; Voinovich v. Quilter, 61 U.S.L.W. 4199, 4202. I want to thank Jonathan Steinberg for providing me with the Transcript of Oral Argument.

156. Voinovich v. Quilter, 61 U.S.L.W. 4199, 4202 (1993).

157. Transcript of Oral Argument before the Supreme Court in Voinovich v. Quilter, at 43.

Reconstructions, which represented the high points of fervor for minority rights in American history, Congress and the courts were flexible and practical. As for logic and more recent history, it is clear that there is no mathematical threshold that sets off influence districts from control districts, and that contemporary experience in actual elections mirrors the hypothetical world sketched above in Table 1. As for law, the most persuasive interpretation of Justice Brennan's prevailing opinion and Justice O'Connor's concurrence in *Gingles* is that the three prongs of the *Gingles* test ought to be considered as a unit, not separately. Subsequent lower court opinions that specifically consider the problem of influence districts either adopt tests like those proposed in this Article (*Garza* and *Armour*) or, through specious reasoning, deny minority communities that would have good chances to elect candidates of their choice the opportunity to do so (*Springfield Park District*). Fears of the consequences of the abandonment of bright line tests are not without merit, but on the whole, are unpersuasive. Even now, such standards can be circumvented or even employed to undermine minority political potency. If the object of voting rights litigation generally is to fulfill the promise of *Carolene Products*,[158] to make sure that the political process is fair and honest and that minority groups do not suffer at the hands of majorities, then courts must intervene to prohibit discrimination in the electoral process against small, as well as large groups.

158. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).